UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2771

September Term, 2015

WOODROW LEE MANNING

v.

STATE OF MARYLAND

Meredith,
Nazarian,
Moylan, Charles E., Jr.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Moylan, J.

Filed: January 31, 2017

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

The appellant, Woodrow Lee Manning, was convicted in the Circuit Court for Wicomico County by a jury, presided over by Judge W. Newton Jackson, III, of the theft of merchandise of a value of less than $1,000. On this appeal, he raises the three contentions:

1. that the evidence was not legally sufficient to support the conviction;
2. that Judge Jackson erroneously failed to instruct the jury on the subject of theft of goods of the value of less than $100; and
3. that the five-year sentence imposed was unconstitutionally excessive.

The Legal Sufficiency of the Evidence

The key witness for the State was John Palmer, the assistant manager of Giant Foods at 751 South Salisbury Boulevard in Salisbury. He described how on June 27, 2015, he observed the appellant in the Giant pushing a shopping cart. Mr. Palmer specifically observed in the cart a 30-pack of beer and a number of steaks. The steaks had been placed in a reusable bag which was sitting on the cart.

At the front of the store where the check-out lines were located, Mr. Palmer observed the appellant walk through an empty check-out line without a register and head through an exit from the Giant. Mr. Palmer followed the appellant, stopped him, and asked him to show a receipt for his purchases. The appellant abandoned the cart and merchandise and started running. Mr. Palmer took off in pursuit and eventually, with the help of local police, stopped the appellant and had him arrested.

The only legal sufficiency issue before us is the value of the merchandise which the appellant stole from the Giant. Even prior to the apprehension of the appellant, Mr. Palmer

had directed one of the Giant's employees to take the cart and its merchandise back into the store. After the appellant's arrest was accomplished, Mr. Palmer employed a sure-fire method for determining the value of the stolen merchandise. He had each of the items from the cart rung up at a cash register just as if that merchandise were being checked out and paid for.

The total value of the stolen merchandise was $107.30. It consisted of the following items:

> "(1) Tbone steak valued at 15.71 dollars
>
> "(1) Tbone steak valued at 16.43 dollars
>
> "(1) Tbone steak valued at 14.99 dollars
>
> "(1) Ribeye steak valued at 15.59 dollars
>
> "(1) Ribeye steak valued at 18.59 dollars
>
> "(1) 30 pack Coors Light valued at 25.99 dollars"

Appellee Br. at 4.

When he testified at trial, seven months after the theft, Mr. Palmer's unaided memory was pretty good. He recalled that the stolen merchandise was worth between $105 and $110. The precise value of $107.30 falls right into the middle of that recollected range. At the time the value was rung up on the cash register, Mr. Palmer had three copies made of the receipt.

> "[DEFENSE COUNSEL]: How did you make the determination of the value of the items that you testified to with assistance from the State?
>
> "[MR. PALMER]: We rung the items up at the front customer service desk. I made three copies, one for me, one as a spare, and one for the officer.

"Q. Did you provide a copy of that to the officer?

"A. Yes.

"Q. Did you provide a copy of that to the State?

"A. I'm not sure, I know the officer got one."

In helping Mr. Palmer get from his approximate recollection of value to the precise amount of $107.30, the State, whether as an exercise of Prior Memory Recorded or of Present Recollection Refreshed, showed him one of the receipts that Mr. Palmer, back on June 27, 2015, had given to the investigating officer. The appellant now contends that because that officer did not take the stand to authenticate the receipt, its substance has no place in assessing the sufficiency of the evidence. The appellant, however, has raised no contention challenging the introduction of the receipt in evidence or the showing of the receipt to Mr. Palmer. An unraised admissibility contention may not piggy-back on a legal sufficiency contention. As far as we are concerned, the precise figure of $107.30 is chiseled in marble. The assessment of legal sufficiency is made on the basis of everything that is actually in evidence and is not limited to only those things that ideally should have been in evidence. Lockhart v. Nelson, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1988).

Ironically, however, it really does not make any difference. The appellant was convicted of theft pursuant to Maryland Code, Criminal Law Article, § 7-104(g)(2) which provides:

> "(2) Except as provided in paragraphs (3) and (4) of this subsection, a person convicted of theft of property or services with a value of less than $1,000, is guilty of a misdemeanor and:

> "(i) is subject to imprisonment not exceeding 18 months or a fine not exceeding $500 or both; and
>
> "(ii) shall restore the property taken to the owner or pay the owner the value of the property or services."

(Emphasis supplied).

The appellant was indicted for the crime of the theft of property with a value of less than $1,000 and with no other theft provision. Ultimate sentencing may be another matter. Section 7-104(g)(3) does, to be sure, go on to provide:

> "(3) A person convicted of <u>theft of property</u> or services <u>with a value of less than $100</u> is guilty of a misdemeanor and:
>
> "(i) is subject to <u>imprisonment not exceeding 90 days</u> or a fine not exceeding $500 or both[.]"

(Emphasis supplied).

The appellant, however, was never charged with the theft of property with a value of less than $100.

The appellant has sought to elevate this lesser sentencing provision into a necessary element of the crime charged. He contends that the State was required to prove that the stolen merchandise has a value of at least $100 and that the State failed to do so.

On this contention, the State wins by either of two ways. It if had been required to prove a value of $100 or more (it had not been so required), it would have done so with legally sufficient evidence to support a value of $107.30, as we have already discussed and held.

The State, however, was under no such obligation. The "less than $100" figure is nothing but a sentencing provision and has nothing to do with the required substantive

elements of the crime actually charged. This precise issue was before the Court of Appeals in Stubbs v. State, 406 Md. 34, 956 A.2d 155 (2008). Under an earlier penalty provision, the upper figure in Stubbs was $500 rather than the present $1,000. Everything else was identical. The holding of Stubbs, 406 Md. at 44, was unequivocal:

> "We hold that, under the plain language of the Consolidated Theft Statute, a defendant charged with theft under $500 – but not charged with theft under $100 – is not entitled to a judgment of acquittal on the ground that the State has failed to establish that the defendant stole property worth at least $100."

(Emphasis supplied).

Even if the value of the stolen merchandise had been less than $100, that would still have been sufficient to support a conviction, for it would be, by definition "less than $1,000." Just as $150 would be "less than $1,000," so too would fifteen cents be "less than $1,000." In order to satisfy the value element of the particular theft of which the appellant was charged and convicted, either would have been equally efficacious. Indeed, a conviction pursuant to the lesser penalty provision would not even be permitted for such a crime had never been charged.

> "In the case at bar, because the State was not required to prove that the stolen wrench set was worth at least $100, the evidence was sufficient to support petitioner's conviction for less than $500.
>
> …
>
> [U]nless a defendant charged with theft under $500 is specifically charged with theft under $100, the trial court is prohibited from entering a judgment of conviction for theft under $100."

406 Md. at 47. (Emphasis supplied).

The bottom line, 406 Md. at 54, was clear.

> "[W]e sustain both the conviction for theft under $500 and the sentence that exceeded the maximum penalty for theft under $100."

(Emphasis supplied).

As Judge Jackson explained to the appellant when he denied the appellant's motion for a judgment of acquittal, the only significance that a value of "less than $100" could have had in this particular case was not as a necessary element of the crime but only as a factor possibly influencing the sentence.

> "THE COURT: Right now the verdict sheet says theft less than $1,000, so the jury, I mean obviously that covers something worth $10. I think your argument would apply to sentencing more than the substantive nature of the charge.
>
> "[DEFENSE COUNSEL]: Right. And I don't know the answer to that, Your Honor, but the sentencing is drastic, and I think, like, the jury should be making that determination so that the Court can go on what the jury –
>
> "THE COURT: All they are going to do is decide if there was theft of something worth less than $1,000. So it could be a candy bar.
>
> "[DEFENSE COUNSEL]: Right.
>
> "THE COURT: And then you argue that he gets a 90 day sentence as opposed to whatever."

(Emphasis supplied).

A Jury Instruction Never Requested

We now move from a non-contention to a non-preserved contention. The appellant now contends that even though he was never indicted for stealing goods with a value of less than $100 and even though the verdict sheet contained no such charge, Judge Jackson, sua sponte, should nonetheless have instructed the jury that it could have considered such

a charge as an additional lesser included offense. Such a sua sponte instruction, now contends the appellant, would further have instructed the jury that it could return a verdict of guilty on such a charge if it believed that the value of the stolen goods was, indeed, less than $100.

As we have already fully discussed, there would have been no merit whatsoever in such a charge to the jury. It is unnecessary, however, to indulge the contention even to that extent. Maryland Rule 4-325(e) is clear, as it provides in pertinent part:

> "(e) **Objection**. No party may assign as error the giving or the failure to give an instruction unless the party objects on the record promptly after the court instructs the jury, stating distinctly the matter to which the party objects and the grounds of the objection."

In discussing the jury instructions in this case, Judge Jackson asked defense counsel if he had a requested theft instruction that he wanted the court to give the jury. Defense counsel responded:

> "Incorporating the State's theft instruction, and forgive me for not including one but the State's is acceptable with me. Subject to the objections I [raised] earlier without waiving such objections."

(Emphasis supplied).

Judge Jackson then instructed the jury, inter alia, that it must determine whether the value of the stolen goods was "less than $1,000." That was the last sentence of the jury instructions. Immediately thereafter, Judge Jackson asked counsel, "Are there any additions or exceptions to the Court's instructions?" Defense counsel responded, "No,

Your Honor." The contention is as unpreserved for appellate review as unpreserved could ever be.[1]

The Sentence

The appellant remains obsessed with the value of the 30-pack of beer and the five mouth-watering steaks. His final contention is that his five-year sentence was excessive. His appellate brief devotes three and one-half pages to this contention. A full three of those three and one-half pages, however, are still belaboring the value of the beer and the steaks, with no mention of sentencing.

The appellant does not tell us what the standard of appellate review is for assessing a trial judge's sentencing decision. The appellant cites not a single case nor statutory provision nor academic authority bearing on the subject of sentencing. The entire legal argument is that compassion is due to one who steals not out of avarice but only because he needs the money:

> "That being said, Your Honor, let me tell you about my client. This is a case where, as we previously indicated, he's been going through some things. He's dealt with bouts of homelessness, he's dealt with bouts of I think he would describe it as mental ups and downs, undiagnosed mind you. There's a group of people around the Giant, who the beer incidentally, he doesn't drink beer, he doesn't drink. He had a person who was attempting to provid[e] him shelter and in exchange for that, they don't have currency to pay, they barter."

The argument then hit high-C:

[1] Should the appellant have received his heart's desire in this regard, he would now be insisting that his conviction for the theft of property worth less than $100 must be reversed on the ground that he had been erroneously convicted of a crime with which he had never been charged.

> "In response to Mr. Manning's allocution, the trial court sentenced Mr. Manning to the maximum sentence permitted by law: 'five years in the Division of Corrections,' all of which was active time. Under the circumstances of this case, this sentence is grossly excessive, and in a progressive judiciary, somewhat barbaric."

What the appellant neglects to tell us is that he was sentenced pursuant to the enhanced sentencing provision of § 7-104(g)(4), which directs in pertinent part:

> "(4) Subject to paragraph (5) of this subsection, a person who has two or more prior convictions under this subtitle and who is convicted of theft of property or services with a value of less than $1,000 under paragraph (2) of this subsection is guilty of a misdemeanor and:
>
> "(i) is subject to imprisonment not exceeding 5 years or a fine not exceeding $5,000 or both[.]"

(Emphasis supplied).

Compassion for the appellant then began to fade discernibly as the Assistant State's Attorney recounted the appellant's history of recidivism over a score of 20 years.

> "His record is as follows: the Defendant was convicted of shoplifting less than $1,500 in State of Delaware in 2013. Theft less than $1,000 in State of Maryland in 2011. Failure to complete a contract in 2006. Malicious destruction of property under $500 in 2002, that's in the State of Maryland.
>
> "In the State of Delaware he was convicted of resisting arrest in September 2006. Forgery, two counts of forgery in 2006. Identity theft in 2006. Those were all in Delaware.
>
> "In Maryland he was convicted of theft less than $300 in 1995. Theft less than $300, a second count, in 1995. And theft less than $300 in September of 1995, those being separate counts."

(Emphasis supplied).

As he pronounced sentence, Judge Jackson further noted, "Apparently you have been charged with theft since this incident." In any event, the appellant has not persuaded us that there was any reversible error in his sentencing.

JUDGMENT AFFIRMED; COSTS TO BE PAID BY APPELLANT.